[The following declaration was filed in *United States v. Alabama Power Co.*, 372 F.Supp.2d 1283 (N.D. Ala. 2005).]

DELARATION OF RICHARD E. GRUSNICK

1. My name is Richard E. Grusnick. I am over 21 years old, am competent to testify, and have personal knowledge of the facts set forth in this declaration. In connection with making this declaration, I have reviewed a number of documents from the Alabama Department of Environmental Management ("ADEM") and the U.S. Environmental Protection Agency ("EPA") to refresh my recollection. These are documents that were generated in the ordinary course of these agencies' work and it was the practice and procedure of the agencies to retain these documents. The ones I found most relevant to my testimony are attached. I also have reviewed the complaint and other filings in United States v. Alabama Power, as well as the opinions and filings in other recent EPA litigations involving similar issues.

2. I was employed by the agency responsible for air pollution control in Alabama for 28 years, from June 1970 through September of 1998, when I retired. I served as the Deputy Director of ADEM from 1996 to 1998. In that capacity, I assisted the ADEM Director in managing the state's efforts for implementing air, water, and waste management programs. From 1982 to 1996, I was the Chief of ADEM's Air Division. In that capacity, I directed the state's efforts to manage air quality within Alabama. These efforts included oversight of the processing of permit applications; development and implementation of new regulatory requirements; interpretation of all ADEM air regulations; enforcement actions; and complaint investigations. The Air Division assumed the responsibilities of the Alabama Air Pollution Control Commission ("AAPCC") in 1982. At that time, I was Director of AAPCC, having been appointed to that position in the same year. From 1974 to 1982, I was Assistant Director of AAPCC, and from 1970 to 1974, I served as an environmental engineer with the AAPCC. (From this point

forward, my references to "ADEM" should be understood to include AAPCC for matters predating ADEM's creation.)

3. My work at ADEM was closely associated with Alabama's program to regulate air pollution from the program's inception until my retirement in 1998. ADEM first adopted regulations to implement a state-wide air pollution control program in Alabama in January of 1972, and I took part in developing those regulations. EPA approved Alabama's initial State Implementation Plan ("SIP") on May 31, 1972. ADEM adopted additional state air regulations that became a part of the SIP after that time, cluding Alabama regulations implementing the 1977 Clean Air Act's Prevention of Significant Deterioration ("PSD") program and the Non-Attainment New Source Review program (collectively called the "NSR programs"). I participated in and supervised ADEM's efforts to seek and obtain EPA approval for these regulations, including direct participation through personal communications and meetings with EPA staff. Further, I participated in and supervised the issuance of permits pursuant to the NSR programs, and I participated in and supervised ADEM's enforcement of those permits.

4. Alabama followed state rulemaking procedures to adopt state PSD regulations rather than accept delegated authority from EPA to implement and enforce the federal regulations. The principal reason for taking this approach was the desire to retain primacy over efforts to manage air quality within the state. It was my belief and understanding that using state-adopted regulations, which were subsequently approved by EPA for inclusion in the SIP, would provide greater flexibility and deference to the state's interpretation of the requirements than if the state were to operate a delegated program. A memorandum dated June 11, 1984, from EPA Assistant Administrator for Air and Radiation to the EPA Regional Administrator (Attachment 1) confirms my understanding of the deference extended by EPA to the state in the interpretation of the state's own regulations.

5. ADEM adopted state regulations to implement the state's PSD permitting program on January 27, 1981. These regulations became the basis for implementing the PSD program in Alabama. Effective December 10, 1981, EPA approved these regulations.

6. Under Alabama's PSD program, major sources of air admissions in areas with air quality better than standards ("attainment areas") must obtain a PSD permit prior to certain construction activities. This requirement applies to the construction of a new source as well as to construction of a major modification at an existing source.

7. ADEM did not require the owner or operator of a source to seek an "applicability determination."

8. ADEM interpreted the phrase "major modification" in its regulations such that the PSD permitting requirement applied only to a project or activity intended to make the existing unit or facility physically bigger, that is, one that would increase unit capacity. A project or activity intended to fix the components and parts of an existing source was not considered by ADEM to be a major modification. Replacing deteriorated or malfunctioning parts to restore or return an existing unit or facility back to its normal or permitted operations was not considered a major modification.

9. Existing sources were generally permitted at a certain hourly capacity and/or set of operating conditions. Either way, ADEM did not view upkeep or repairs which promoted the expected operations at these sources as major modifications. Rather, ADEM focused on the maximum hourly rate of emissions. Only if the maximum hourly rate of emissions increased as the result of a project or activity could the activity potentially trigger PSD requirements. This was how ADEM applied the production rate and hours of operations exclusion in the state's regulations. Only activities which caused an increase in the maximum hourly emission rate would have then triggered as evaluation of the routine maintenance, repair and replacement exclusion or the evaluation of the net emissions at the plant as a whole.

10. The definition of "major modification" in Alabama's PSD regulations has not changed substantively since its original adoption in 1981.

11. ADEM did not interpret the Alabama PSD rules in way that would require PSD preconstruction permitting for projects or activities on the basis of increased availability or utilization of a facility, rather than first determining if there was an increase in the maximum hourly rate of emissions.

12. I do not recall any suggestion from any EPA official that the exclusion for routine maintenance, repair and replacement should be determined with reference to what is routine at a specific unit, plant or facility. I can recall no EPA directive or guidance from my time of service at ADEM indicating a policy of applying such a standard rather than an industry-wide standard. I recall no EPA directive or guidance from my time at ADEM suggesting that "major modification" or the exclusion for routine maintenance, repair, or replacement should be determined with reference to the absolute cost of the project, the accounting treatment of project costs (for example, as capital costs or expenses), or the employment status of personnel carrying out the project (for example, as employees or contractors).

13. ADEM utilized many techniques to insure that the requirements of its regulations were satisfied, including inspections, review of plant records, requiring periodic reports from the regulated community, and direct personal communications between ADEM staff and representatives of the plant. An on-site inspection of each major plant in the state was conducted at least once per year. During these inspections, maintenance, repair, and replacement activities often would be observed.

14. ADEM was aware that Alabama Power and other sources undertook projects similar or comparable to those named in the complaint and even some of those very projects. In my preparation for this declaration, I identified documentation of the following specific examples:

a. Attachment 2 includes reports of two unannounced inspection for Alabama Power Company's E.C. Gaston Stem Plant which indicate that Unit 5 was out of service for scheduled maintenance during the course of inspections. The report, dated April 15, 1991, concerns an inspection conducted on April 8, 1991, which appears to be during the time of one of the Gaston projects which is the subject of this litigation.

b. Alabama Power Company approached ADEM in February of 1984 to discuss alternative opacity monitoring procedures to be used while converting Unit 10 to a balanced draft system. Attachment 3 includes a memorandum of the meeting and follow-up correspondence regarding this issue. The Unit 10 conversion appears to be one of the projects which are the subject of this litigation. It is clear that Alabama Power was not attempting to hide this conversion.

15. Based on my experience, industrial facilities in this state, including electric utilities, are continuously performing maintenance, repairing or replacing components that wear out, and otherwise undertaking the steps necessary to maintain their operations. ADEM did not view these actions as triggering a PSD review, not did EPA ever suggest otherwise while I was at ADEM.

16. EPA had oversight responsibility to ensure that the state program satisfied the requirements of the Clean Air Act. EPA would periodically issue policy memoranda which would provide EPA's guidance on major air program policy issues. These were internal EPA documents which underwent no public notice but were intended to influence how state programs would be implemented. Several of these memoranda dealt with the PSD program. However, EPA did not communicate to ADEM the interpretations of PSD preconstruction permitting requirements that it advances in its NSR cases against other utilities and, apparently, against Alabama Power. To the contrary, contemporaneous EPA guidance documents offered no hint of these interpretations, in spite of numerous opportunities to do so.

Among the documents issued by EPA over the years are the following:

a. EPA periodically made efforts to influence implementation of the PSD program. One of the more comprehensive efforts was undertaken by Craig Potter, EPA's Assistant Administrator for Air and Radiation. He created a New Source Review task force on June 27, 1986, which prepared a Final Draft Report in December of 1986 (Attachment 4). This report addresses numerous problems in the implementation of the NSR programs, but it does not promote the interpretations suggested by EPA.

b. Based on the findings of the task force, Mr. Potter issued a memorandum to the EPA Regional Administrators on December 1, 1987, entitled "Improving New Source Review (NSR) Implementation" (Attachment 5). The stated purpose of the memo was to establish "certain program initiatives designed to improve the timeliness, certainty, and effectiveness of these programs." The memorandum dealt with threshold applicability issues as well as implementation of the requirements once it was clear PSD applied. Among other things, the memorandum set up a system for EPA oversight of PSD permits, created a new method for determining best available control technology (top down BACT) for sources subject to the requirement, promised to improve training , and promised to improve guidance development and distribution. The memorandum also encouraged the Regional offices to "review minor permit actions which exempt an otherwise major source or modification from a major review (*e.g.*, 'synthetic' minor sources)." This minor source permit issue was a threshold applicability question. Specifically, sources could avoid a PSD review if they accepted emission limits which were less than the thresholds established by the regulations. EPA apparently had developed concerns that this approach for avoiding a

PSD review had not been properly implemented. Neither the report nor the memorandum made any mention of sources improperly avoiding PSD reviews for modifications.

c. EPA issued a lengthy New Source Review Workshop Manual in October of 1990. Despite extensive guidance comprising over 300 pages on such issues as BACT, synthetic minor sources, and emission netting, the Manual devotes less than two pages to the implementation of the exclusions from "physical change" (such as routine maintenance, repair, and replacement), and it offers not suggestion of EPA's current positions on this subject.

17. EPA had numerous, regular opportunities to identify ADEM's policies and offer suggestions in the event it disagreed with ADEM on a point of interpretation. During my tenure as Chief of the Air Division, EPA would usually conduct an annual on-site audit of ADEM's Air Program. The audits generally included a mid-year review where Regional EPA staff members would visit ADEM, meet with staff, perform file reviews of individual plants, and review other records. Further, EPA had a mechanism to strongly encourage ADEM agreement with or acquiescence to its established policies. The federal grant process included an annual negotiation of commitments between EPA and the state. EPA would routinely identify the outputs or topics it considered high priority (often based on EPA headquarters' guidance) and negotiate commitments from ADEM. Over the years, EPA identified several PSD related outputs that it wished included in ADEM's grant commitments. These included commitments to implement top down BACT and to provide EPA copies of synthetic minor source permits.

18. No audit or grant discussion ever targeted implementation of the modification provisions of the PSD regulations consistent with EPA's current interpretation as set forth in EPA's other NSR enforcement cases or this case, and I do not recall this topic ever being an issue identified during an audit.

19. ADEM's non-NSR air permitting requirements generally were not applied to projects at major sources if they did not trigger an NSR review.

20. I have been retained as a consultant in this case. I am being compensated for my consulting time at my standard rate of $150 per hour.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

[/s/ Richard E. Grusnick 10/7/04]
Richard E. Grusnick